Petition

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ALEXANDER L. STEVAS,
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81-1504

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

DAVID LLOYD BECKSTROM,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE COURT OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTIONS PRESENTED BY THE APPEAL

1

MAY A SEARCH WARRANT ISSUE ON UNCORROBORATED INFORMATION RECEIVED BY A CRIMINAL INFORMANT WITHOUT ESTABLISHING THAT THE INFORMANT IS PRESENTLY "RELIABLE" AND THAT HIS RELIABILITY HAS BEEN RECENTLY ESTABLISH?

2

DOES OBSERVATION OF A SINGLE MARIJUANA CIGARETTE WITHIN A VEHICLE JUSTIFY A WARRANTLESS SEARCH AND SEIZURE OF OTHER NON-CONTRABAND PROPERTY WITHIN THE VEHICLE?

3

IS FAILURE TO APPLY THE DOCTRINE OF STARE DECISIS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

The petitioner, DAVID LLOYD BECKSTROM, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California entered on September 15, 1981. A copy of the opinion is attached as **Appendix "A".** The California Supreme Court Denied a petition for Hearing on December 9, 1981.

JURISDICTIONAL STATEMENT[1]

1 No other party is involved in this petition

JURISDICTION

The iurisdiction of this Court is invoked under **TITLE 28, UNITED STATES CODE, Sect.1257; Rules of the Supreme Court of the United States, Rule 19.**

OPINION BELOW

On September 15, 1981, the Court of Appeal for the State of California, Division II, Fourth Appellate District, in 4 Crim. No. 12459, affirmed the conviction of DAVID LLOYD BECKSTROM for, in Count I, a violation of California Health and Safety Code Section 11358, Cultivation of Marijuana, and in Count II, a violation of California Health and Safety Code Section 11359, Possession of Marijuana for Sale, said conviction being had in the Superior Court of Orange County in Case No. C 44329, following denial of his motions to set aside the information, and to suppress evidence, and entry of his pleas of nolo contendre. A copy of opinion of the Court of Appeal is attached as Appendix "A". A copy of the Order of the Supreme Court denying Hearing is attached as Appendix "B"

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation. . .

United States Constitution, Amendment V:

Nor shall any person . . .be deprived of life, liberty or property, without due process of law . . .

United States Constitution, Amendment XIV:

Nor shall any state deprive any person of life, liberty or property without Due Process of Law, nor deny to any person within its jurisdiction The Equal Protection of the Laws.

STATEMENT OF THE CASE

On May 8, 1980, in a two-count information filed by the District Attorney of Orange County, California, petitioner was charged with cultivation of marijuana, and possession of marijuana for sale, in violation of California Health and Safety Code Sections 11358 and 11359. Arraignment was had on May 15, 1980, and petitioner entered pleas of Not Guilty.

On July 25, 1980, a hearing was held on petitioner's motion to Set Aside the Information (Penal Code Sec. 995), and on his motion to Quash and Traverse the Search Warrant and to Suppress Evidence (Penal Code Sec. 1538.5). On July 28, 1980, the trial court denied said motions, and petitioner withdrew his plea of not guilty, and entered a new and different plea of nolo contendere to both counts of the information. Petitioner applied for and was granted probation for a three year period under specified terms and conditions, the first of which required that he serve ten months in the Orange County Jail.

Confinement was stayed pending appeal. On November 21, 1980, a timely Notice of Appeal was filed in the trial court.

On September 15, 1981, the Court of Appeal filed its opinion affirming the conviction. **(Appendix "A").**

On December 9, 1981, the California Supreme Court denied a Petition for Hearing to review the judgment of the Court of Appeal **in re 4 Crim. No. 12459. (Appendix "B").**

REASONS FOR GRANTING THE WRIT AND ARGUMENT THEREON

This Court's decisions in **Aguilar vs. Texas** (1964) 378 US 108 and **Spinelli vs. United States** (1979) 393 US 410 established that for an affidavit based on an informant's hearsay statements to be legally sufficient to support issuance of a search warrant, two requirements must be met: (1) The affidavit must allege the informant's statement in language that is factual rather than conclusionary, and must establish that the informant spoke with personal knowledge, and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable.

To establish the credibility of a criminal informant either he must be shown to have given reliable information in the past with regard to criminal activity, or the information he is presently giving must be corroborated.

In the instant case, a search warrant issued on the sole basis of the uncorroborated information of a criminal informant. The informant was alleged in the affidavit to be a "reliable informant" on the grounds that his prior information had led to ten arrests and convictions in another jurisdiction. The affiant did not disclose to the magistrate the fact that **perhaps as many as ten years had separated** the period in which the informer had given said information, and the time he gave information in the present case; i.e., it was not disclosed that the ten-year-old facts were the only basis for the asserted **present** reliability.

This Court has never decided either of the following two important issues of a recurring nature: (1) **Does the reliability of a criminal informant once established, despite intervening years without further police contacts or experience, based on nothing more than the old facts, sufficiently demonstrate a present reliability, without more, to permit his uncorroborated information to provide the sole basis for issuance of a search warrant?** And (2) **when a criminal informer is alleged to be reliable based on prior police experience with him, can a search warrant validly issue on the basis of his uncorroborated information, if the affiant withholds from the magistrate the facts that his present reliability is based entirely on stale facts?**

The only California case to confront the first of these issues is **People vs. Schmidt** (1980) 102 CA 3d 172, 162 Cal.Rptr. 171. In **Schmidt,** a search warrant issued on the basis of an informant's uncorroborated information. It had been alleged that the information was "reliable".

The Court of Appeal, finding that the informant was a "**criminal** informant" (as differentiated from a "citizen or non-criminal informant") said that his information would require corroboration of criminal activity, **unless** it could be shown that the informant was, indeed, a "**reliable** criminal informant".

The facts underlying the affiant's allegation that the informant was reliable were that in in 1972 (some six or seven years earlier) he had become an informant in Imperial County, Calif. He disappeared from Imperial County, and surfaced in Mendocino County about seven years later, and again moved in the criminal world as part of it. Nothing was known of his life during the intervening six or seven years, other than, at the time of execution of the affidavit there were "no pending charges against him".

The Court of Appeal held that the **old** facts of reliability, in view of the passage of time, could **not** support a **present reliability;** that when a criminal informant, once shown to be credible, ceases to be an informant for a long period of time, and then reappears again in the context of a criminal informant, he is suspect for all the **same** reasons that he was suspect originally; that his credibility must be re-

established; he needs a new "track record" (see **Moore vs. State** (1971) 13 Md.App. 711, 284 A2d 614).

As the Courts of this State, and those throughout the United States, under the leadership of this court, **(United States vs. Chadwick** (1977) 433 US 1; **Robbins vs. State of California** (1981) 453 US _____, 101 S.Ct. 2841) increasingly insist upon adherance to the **Rule of a Warrant,** the use by the police of the so-called "reliable criminal informant's information" as the basis for issuance of search warrants has risen in corresponding ratio. If the information of a criminal informant need not be corroborated as long as the informant is alleged to be "reliable", it is reasonable to conclude that many more informants are being and will be alleged to be "reliable" than ever before, and unless this court considers, and hands down guidelines concerning the proper evaluation of the factors to be considered in making a determination of "reliability", the issues herein raised will reoccur with increasing frequency and courts will be without unifying instruction by which to resolve them.

In the second issue raised above, does the affiant have an obligation to present **all the facts** in his possession to the magistrate, relevant to the affiant's designation of a criminal informant as "reliable", in order that the magistratedf may be able to make an independent evaluation of the issue of the informant's credibility? In **People vs. Schmidt,** supra, had the magistrate known that the facts

asserted to show a **present** reliability were based entirely on police experience with the informant **seven years earlier** and that nothing was known as to his reliability during the past seven years, would the magistrate have issued the search warrant on his uncorroborated information?

In the case at bar, had the magistrate known or have been informed that the informant's reliability was based on facts as much as ten years old or longer, and that there were no facts supporting a **present** reliability, other than that there were "no pending charges" against him, would he have issued the search warrant? In the absence of the complete facts within the affiants possession, was the search warrant validly issued?

In the vast majority of arrests occurring daily throughout this nation, there lies the inevitable potential for development of criminal informants. What arrestee is not asked to implicate his confederates? Rewards of one kind or another, including liberty or avoidance of punishment are offered and accepted daily in exchange for informations. Can a criminal informant who provided reliable information in one situation, say, five years ago, be entitled to a **present** reliability based entirely on that old set of facts?

Many years ago, this Court recognized the infirmities inherent in the use of stale information as a basis for issuance of a search warrant (**Sgro vs. United States** (1932) 287 US 206, 53 S.Ct. 138, 77 L.Ed 2d 260), and handed down guidelines for the use and guidance of the courts below. For all the same reasons, it is urged that this Court consider and decide on guidelines for the proper assessment of criminal-informant reliability, and in particular, as to the necessity if any, of a showing of a **present** reliability if a warrant is to be issued on the informant's uncorroborated information; and to establish the responsibility of an affiant, if any, to provide the magistrate with **all** the relevant facts underlying the allegation of reliability as applied to the criminal informant, even when such facts may operate against a finding of reliability.

Petitioner raised the issue of the informant's reliability based on stale facts, at both the trial and appellate levels, in each instance citing and relying upon the controlling decision of the California Court of Appeal in **People vs. Schmidt,** supra, in which the conviction was reversed on identical grounds, as set forth above. The judgment was affirmed in an opinion **(Appendix "A")** in which neither the issue nor the **Schmidt** decision was even mentioned. There are no California precedents on said issue which are in conflict with **Schmidt** and its unequivocal holding. The trial court was bound to follow the law as set down in the **Schmidt** decision under the doctrine of **Stare Decisis**

(Auto Equity Sales, Inc. vs. Superior Court (1962) 57 Cal.2d 450 20 Cal.Rptr. 321, 369 P.2d 937). It is the contention of petitioner that failure of the trial court in this instance to follow the law of the superior jurisdiction was a violation of his constitutional rights under the **Fifth** and **Fourteenth** Amendents' guarantees of Due Process and Equal Protection.

In the instant case, after a search warrant had been issued, but prior to its execution, officers observed an unknown individual emerge and drive away from the location to be searched. The officers had the vehicle stopped, the driver identified, and during the detention, a single marijuana cigarette was observed within the driver's compartment. There was no warrant authorizing the vehicle search, and no exigent circumstances alleged. During a search of the vehicle an envelope containing non-contraband papers, including a lease, was opened and seized.

Petitioner, citing and relying on the decision of the California Supreme Court in **People vs. Minjares** (1979) 24 Cal.3d 410 153 Cal.Rptr. 224, 591 P2d 514, and this court's decisions in **Wong Sun vs. United States** (1963) 371 US 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 and **United States vs. Chadwick** (1977) 433 US 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538, in the trial court, and in the District Court of Appeal, contended that in the absence of any suggestion of exigent circumstances, the warrantless search of the vehicle was unlawful and that the evidence acquired

thereby should be, or should have been suppressed. Under the facts and circumstances both trial and appellate courts were bound under the doctrine of Stare Decisis to follow the decisions and the law as interpreted therein, by superior tribunals, and did not do so. Petitioner would urge this Court to grant this petition to decide whether and to what extent the failure of the trial and appellate courts to follow and apply the doctrine of Stare Decisis may have depreived petitioner of his constitutional rights of Due Process and Equal Protection of the Law.

CONCLUSION

For all of the foregoing reasons, petitioner, DAVID LLOYD BECKSTROM, respectfully requests that a writ of certiorari issue to review the Opinion of the Court of Appeals of the State of California.

DATED:_____,1982.

Respectfully submitted,

_____

Roger S. Hanson

Member of the Bar of the
U.S. Supreme Court

&

_____

JOHN M. KEMP, Attorneys for
Petitioner, DAVID LLOYD BECKSTROM

Appendix

APPENDIX "A"

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent,
v.
DAVID LLOYD BECKSTROM,
Defendant and Appellant.

APPEAL from the Superior Court of Orange County. William W. Thompson, Judge. Affirmed.

John M. Kemp for Defendant and Appellant.

George Deukmejian, Attorney General, and Robert B. Shaw, Deputy Attorney General, for Plaintiff and Respondent.

After an unsuccessful motion to suppress, defendant pled guilty to cultivation and possession for sale of marijuana.

An informant advised officers that marijuana was being cultivated at a certain warehouse. Officers went there and, about 10 p.m., saw codefendant Green step out of the building with an electric fan. He walked around the front of the building for five to ten minutes "continually looking around," then went inside. Thereafter, about midnight, five men, including the defendant and Green, left the

building. Defendant drove off and the officers decided to stop him for identification. He was stopped pursuant to an outstanding traffic warrant and identified.

Officers then secured a search warrant and went to the warehouse. At this time the defendant's truck was again parked in front. There were lights inside the building. Green came out and got in his car. An officer approached him. Green stopped, backed up across a curb, made a U-turn, and accelerated rapidly failing to stop for a stop sign as he departed. A broadcast was put out to stop him and he was stopped. In his car was observed in plain sight a handrolled marijuana cigarette. Green was arrested. A search of the glove compartment revealed an envelope with the name "Dick" written across it and the word "lease" in parentheses. The lease was in the name of the defendant and was for the warehouse.[1]

In the meantime, the officers knocked, stated their identity and possession of the warrant and demanded admission. They received no response, so entered, and found 192 marijuana plants of 8 to 10 feet growing in 15 gallon buckets with a full-fledged marijuana farm in operation with lights, irrigation and fertilizer.

Defendant contends:

(1) That there was insufficient evidence afforded to the magistrate as to the reliability of the confidential informant. We do not agree.

1. The officers already knew the utilities at the warehouse were in defendant's name.

The magistrate was informed that the informant had a history of involvement with marijuana, that he had seen marijuana plants in pots and that he had experience with marijuana. Additionally, he had previously given leads in approximately ten cases which led to arrests and convictions. He had seen this marijuana in this warehouse when he attempted to dislodge his frisbee which had gotten stuck under the garage-type door to the warehouse. When he leaned down to get the frisbee, he had seen the potted plants which he recognized as marijuana.

The information given was factual, not conclusionary. The informant spoke with personal knowledge and the information given as to his background was such as to give the magistrate reasonable cause to believe that the informant was reliable. Reliability was established.

(2) That there was insufficient probable cause to issue the warrant.

When the information was supplied by a knowledgeable person, no further corroboration was required. (In addition to the above, the informant noted that the windows were either painted, boarded up or covered with aluminum foil and that inside the warehouse were some extremely bright lights and a very wet floor.) If any corroboration is necessary that corroboration consisted of the observation of the officers which made it clear that there was apparently no on-going legitimate business activity in connection with the building. When the officers

were watching codefendant Green, he walked around about five or ten minutes in front of the building "continually looking around." Then five men were seen leaving the building at about midnight. From all of this the magistrate was reasonably entitled to believe that ongoing cultivation of marijuana existed.

(3) That there was no probable cause for Green to be stopped and detained. Quite to the contrary.

The grounds for detention are that some activity relating to crime is taking place and the person to be detained is involved in that activity. Here, when the officers were attempting to serve a search warrant, Green took evasive measures to get away as fast as he could, backing up over the curb, making a U-turn, accelerating rapidly and running a stop sign. He was then legally detained and when this is all put together with the observation of a marijuana cigarette in the car, the officers had reasonable ground to arrest him because there were facts known to the officers which would lead persons of ordinary care and prudence to strongly suspect that Green was guilty of a criminal offense.

(4) Defendant concedes that probable cause existed for the officers to search the passenger area of the car once the marijuana cigarette was found in plain sight. However, he contends that the scope of the search was exceeded when the officers looked into the envelope and saw the lease. However, once finding contraband, the officers had

probable cause to believe that the envelope contained additional contraband since envelopes are a common place for storing marijuana. The glove compartment was adjacent to and immediately available to the occupants of the vehicle. It was an appropriate area to be searched. (**Wimberly v. Superior Court,** 16 Cal. 3d 557.)

Judgment affirmed.

/s/ Gardner

P.J.

We concur:

We concur:

/s/ Tamura

J.

/s/ Morris

J.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

I have this day filed Order

HEARING DENIED

In re: 4 Crim No. 12459
PEOPLE
vs.
David Lloyd Beckstrom

Respectfully,

Clerk

DEC 9 1981

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 North Bush Street, Santa Ana, California 92701.

On February 8, 1982, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Attorney General
State of California
110 W. "A" Street,
Suite 600
San Diego, CA 94101

Clerk of the Superior Court
County of Orange
700 Civic Center Drive West
Santa Ana, CA 92702

Clerk, Court of Appeal
4th Appellate District
303 West Third Street
San Bernardino, CA 92401

Clerk
California Supreme Court
3580 Wilshire Blvd, Room 213
Los Angeles, CA 90010

I certify under penalty of perjury that the foregoing is true and correct

true and correct.

EXECUTED on February 8, 1982, at Santa Ana, California.

JACK GALLAGHER